

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

CONGREGATIONAL COMMUNITY
CHURCH OF SUNNYVALE d/b/a
CONGREGATIONAL COMMUNITY
CHURCH COMMUNITY PRE-SCHOOL

Employer

and

Case 19-UC-764
(Formerly Case 32-UC-425)

CALIFORNIA FEDERATION OF
TEACHERS, AFFILIATED WITH AMERICAN
FEDERATION OF TEACHERS, AFL-CIO

Union-Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record¹ in this proceeding, the undersigned makes the following findings and conclusions.²

SUMMARY

The Congregational Community Church of Sunnyvale, d/b/a Congregational Community Church Community Pre-School (the "Preschool") is a California non-profit corporation, with a facility located in Sunnyvale, California, at which it is engaged in providing preschool child education. The Union-Petitioner ("Petitioner") is a labor organization that currently represents a bargaining unit ("Unit") of about 32 of the Employer's approximately 35 total employees.³

¹ The Employer and the Petitioner timely filed briefs, which were duly considered.

² The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

³ On September 26, 2008, the Petitioner filed a representation petition in Case 32-RC-5590. On October 15, 2008, Region 32's Regional Director approved the parties' stipulated election agreement, in which the parties agreed to an election date of November 4, 2008. The stipulated unit language contained a reference to an attached Appendix A, stating that the parties disputed whether or not the Assistant Director, Bookkeeper, and Maintenance Engineer (Handyman) positions should be included in the unit and, therefore, agree that the persons holding these positions may cast ballots in the November 4 election, subject to the Board's challenge ballot procedures. A majority of bargaining unit employees voted to elect the Petitioner as the exclusive bargaining representative at the November 4, election, and the Regional Director of Region 32 issued a Certification of Representative on November 19, 2008.

The Petitioner filed the instant petition seeking to clarify the Unit to include the positions of Maintenance Engineer (Handyman),⁴ Assistant Director, currently held by Linda Medwin, and Office Administrator/Bookkeeper ("Bookkeeper"), currently held by Lucille Story. The Employer argues that the petition should be dismissed because the Assistant Director and Bookkeeper positions are supervisory and that the Bookkeeper position is also confidential, and thus, they should not be included in the Unit. The Petitioner argues that the record does not support the Employer's assertion that the Assistant Director and the Bookkeeper positions are supervisory or that the Bookkeeper position is confidential.⁵

Based on the record evidence and the parties' contentions and arguments, I find that unit clarification is appropriate to resolve the placement of the Assistant Director and the Bookkeeper positions. I further find that the Employer has not met its burden demonstrating that the Assistant Director and the Bookkeeper are supervisors within the meaning of Section 2(11) of the Act or that the Bookkeeper is a confidential employee. Accordingly, I shall clarify the existing Unit to include the Handyman, Assistant Director and Bookkeeper positions in the facility-wide bargaining unit.

Below, I have provided a section setting forth the evidence, as revealed by the record in this case, relating to the Employer's operations, and the duties and responsibilities of the job classifications in question. Following the "Record Evidence" section is my analysis of the applicable legal standards in this case, my conclusion, and a section ordering clarification of the Unit to include the Assistant Director and Bookkeeper positions.

I. RECORD EVIDENCE

A. The Preschool's Operations

The Congregational Community Church of Sunnyvale (the "Church") started the Preschool approximately 40 years ago as a non-profit child care and Preschool facility for children ages 2 to 5. The Church is run by a Church Council ("Council") made up of seven individuals, including a Chairman of the Preschool Board ("Chairman"). The Preschool Board currently has three voting members who are volunteers from the Church congregation. According to the Community Pre-School Policy Manual ("Policy Manual"), the Director and the Bookkeeper serve as ex-officio members of the Preschool Board.⁶ Neither the Preschool Board nor the Council is involved in the Preschool's daily operations, but both are heavily involved in budgetary issues at the Preschool, including making decisions regarding Preschool salary/wage increases.

Currently, there are approximately 240 children enrolled at the Preschool. The Preschool operates morning and afternoon early education classes and provides childcare facilities. The Preschool employs approximately 35 employees, including the Director, Assistant Director, Bookkeeper, teachers, a cook, and a handyman.

The Preschool facility consists of 8 rooms: 4 childcare rooms, 3 Preschool rooms, and a music room. Adjacent to student instruction rooms is an office that is across a courtyard and must be accessed through a door separate from any student instruction rooms. The Preschool office has 4 rooms, 3 of which are occupied by the Director, Assistant Director, and the

However, the proceedings in Case 32-RC-5590 did not resolve the parties' dispute concerning the Assistant Director, Bookkeeper, or Handyman.

⁴ At the beginning of the hearing, the parties stipulated that the Maintenance Engineer (Handyman) is properly included in the Unit. Therefore, I shall clarify the Unit to include the Maintenance Engineer (Handyman).

⁵ Neither party is contesting any community of interest issues.

⁶ The Director and Bookkeeper are not voting members of the Preschool Board.

Bookkeeper. The Director has a private office, with a door that can be shut, whereas the Assistant Director and the Bookkeeper share an office outside the Director's office, in an open area that is frequently accessed by staff, students, and parents.

Barbara Steinmetz has been the Director of the Preschool since March 2006 and receives an annual salary of \$54,000. The Director is responsible for operating the Preschool and providing financial reports to the Preschool Board at monthly Preschool Board meetings. The Director is required to attend monthly Preschool Board meetings.⁷ The Bookkeeper has not been required to be present at monthly Preschool Board meetings since approximately May 2008, when a financial consultant began preparing monthly financial reports for the Preschool Board.⁸ The Chairman then provides the Preschool's monthly financial reports to the Council.

B. Bargaining

The parties have not commenced negotiations for a collective bargaining agreement since the Board election on November 4, 2008. Further, the Council will decide who will participate on the Preschool's bargaining team.

C. Assistant Director and Bookkeeper Positions

Linda Medwin has worked at the Preschool for approximately 26 years and has held the Assistant Director position for over 10 years. Lucille Story has been the Bookkeeper at the Preschool for approximately 20 ½ years. No employees report to the Assistant Director or the Bookkeeper. Unlike the Director, neither Ms. Medwin nor Ms. Story receives a salary. Ms. Medwin typically works 30 to 32 hours per week and receives a wage of \$28.85 per hour. Ms. Story usually works between 27 and 30 hours per week and receives a wage of \$28.35 per hour.

1. General Duties of the Assistant Director and the Bookkeeper

According to the Policy Manual, the Assistant Director's duties consist of keeping class rosters and sign-in sheets current; reviewing the parent handbook; conducting fire and earthquake drills; conducting staff meetings and in-service activities as required; planning curriculum with staff and the Director; recording minutes from meetings and distributing them to staff; attending parent conferences when asked; attending all Preschool functions; aiding staff with photocopying, laminating, education concerns, etc.; substituting in classrooms; recording incoming checks and preparing bank deposits; showing prospective parents the school and disseminating school information; making classroom observations; assisting the Director as requested; and being able to substitute for the Director when needed.

According to the Policy Manual, the Bookkeeper is responsible for keeping all records current; calculating monthly payroll and preparing the computer input sheet; calculating annual vacation and PTO (personal time off); paying medical, dental, and vision insurance benefits; administering all employee benefits; preparing monthly time cards; paying incoming bills; filing all records; reconciling bank statements; recording all bank transactions; paying state and federal taxes; keeping IRS records including W-2's and W-4's; attending all Preschool Board and staff meetings; keeping all financial records current; delivering and picking up payroll information and pay checks; helping the Director in budget planning; assisting the Director when

⁷ The record is unclear whether the Assistant Director is required to attend Preschool Board meetings.

⁸ The record is unclear whether the Preschool hired a different certified accountant to work on the 2007 financial reports or whether the same financial consultant assisted with the 2007 financial reports as well as the 2008 financial reports.

requested; ordering office supplies; substituting for the Director when needed; and giving school tours and disseminating school information.⁹

2. Alleged Supervisory Duties for the Assistant Director and Bookkeeper

In the instant case, the Employer asserts the Assistant Director possesses the primary indicia for supervisory status because she exercises independent judgment in disciplining employees, assigning teacher classrooms and work hours, and determining overtime. The Employer also asserts the Assistant Director and Bookkeeper make effective recommendations regarding discipline, hiring and discharge, as well as resolutions of employee grievances.

a. Assistant Director and Bookkeeper effectively recommending hire, discipline, and grievance adjustment

1) Effectively recommending hire

The Employer provided no documentary evidence showing actual hiring notwithstanding that the Director testified that she has hired 23 employees in her tenure. Specifically, the Director testified that, in some instances, she interviewed up to five individuals for each opening. Moreover, the Director conducts all first interviews for prospective applicants on her own, but testified that she includes the Assistant Director or the Bookkeeper at any second interviews. However, of these 23 hires and seemingly hundreds of interviews, the Director could only recall the Assistant Director being present at the second interviews of three hired employees, Eugenia Halmagean, Merry Tan, and Masako Kodoma.¹⁰ The Employer maintains no records regarding interviews. Further, the Director asked the Assistant Director to look at least one or two applicant resumes as well, including Merry Tan's, before Tan's second interview.

The Assistant Director and the Bookkeeper were also present at the second interview over a year ago for an applicant who speaks English as a second language. Once that interview concluded, the Assistant Director and the Bookkeeper told the Director they had difficulty understanding the applicant. The Director recalls the Assistant Director and Bookkeeper recommending not to hire that applicant, whereas the Assistant Director and the Bookkeeper deny recommending whether or not the Director should hire her. Rather, both recall merely telling the Director they had difficulty understanding the applicant. Moreover, the Director testified that she decided not to hire that applicant, not based solely on the negative recommendation from the Assistant Director and the Bookkeeper, but based on her own observation that the applicant was having a hard time communicating, was very quiet, and was not the best fit for the Preschool.

The Assistant Director recalls the Director asking her input regarding an applicant who did not show up or failed to show up on time for her first scheduled interview, then engaged in similar behavior for her next scheduled interview. When the Director asked the Assistant Director what she thought about the applicant, the Assistant Director replied that she did not

⁹ The Policy Manual contains an additional duty for the Bookkeeper: "13. Prepare monthly financial report for board meetings." The Bookkeeper testified that this duty was eliminated from her position description and she is no longer responsible for preparing the monthly financial reports since May 2008, when the financial consultant began preparing the monthly financial reports for the Preschool Board.

¹⁰ The record is unclear regarding when these interviews occurred. The Bookkeeper testified that she participated in 2 or 3 interviews, including an applicant who spoke English as a second language and Masako Kodoma. The Bookkeeper testified that after Masako's interview, she told the Director that Masako looked well qualified. The Bookkeeper could not remember if anyone else was in Masako's interview. The Assistant Director testified she did not sit in on Masako's interview.

think that it bodes well for an employee's ability to do a job if she does show up for an interview on time. The Director hired the applicant despite the Assistant Director's negative comments.¹¹

The Bookkeeper recalls that over a year ago, the Director asked her opinion about an applicant whom the Director wished to interview and who required immigration sponsorship. The Bookkeeper told the Director that the Preschool should not be involved in sponsoring any employees for immigration purposes and, according to the Director, she ultimately decided not to interview the applicant based solely on the Bookkeeper's advice.

2) Effectively recommending discipline¹²

It is undisputed that since the Director started in March 2006, she has been the only one to issue any discipline at the Preschool. According to the Director, when she is present at the Preschool, the Assistant Director's role in discipline is to bring any violations to her attention. Moreover, the Director testified that if a disciplinary issue arises when both the Director and Assistant Director are present at the Preschool, the Assistant Director would not discipline any employee without talking to the Director first and that the Director always conducts an independent investigation before issuing any discipline.¹³

The Employer argues and the Director testified that in her absence, the Assistant Director has the authority to orally discipline teachers and to send teachers home for the remainder of the day without pay.¹⁴ However, there is nothing in the record to establish, in the 10 plus years that Ms. Medwin has occupied the Assistant Director Position, that she was ever informed of or that she has ever exercised that alleged disciplinary authority. In fact, Ms. Medwin testified that she never issued any discipline in the Director's absence or any other time for that matter. Even the Director could not recall any specific time when the Assistant Director recommended an employee receiving discipline.

In her 10 years in the position, the Assistant Director could only recall one employee¹⁵ for whom she provided disciplinary feedback to the Director, and even then, the Director made the decision and effectuated the termination without any further participation from the Assistant Director. As for the Bookkeeper, of the four written reprimands the Director has issued, the Bookkeeper has edited at least two of them, merely for grammar and flow rather than reviewing the substantive decision to discipline. Significantly, the record contains no documented discipline or evidence of any discipline that resulted, in whole or in part, from the Assistant Director or the Bookkeeper's respective recommendations. Furthermore, the record does not contain documentary evidence or concrete examples showing that the Director generally follows the Assistant Director's or Bookkeeper's recommendations regarding discipline.

¹¹ The record is unclear as to when the employee was hired.

¹² The Policy Manual addresses progressive discipline and termination (emphasis added): "The use of inappropriate or unprofessional behavior toward a child, parent, or a member of the staff, frequent absences or tardiness, inability or lack of interest in meeting the job description may result in the termination of employment. There will be three written notations and conferences **with the Director** before termination. The school relies on cooperation and dependability and it is very important that the staff work together to help create a nurturing environment for the children, parents, and staff."

¹³ The Director's independent investigation consists of talking to the teachers about the issue, talking to the Assistant Director, and then making her informed decision about the need for discipline.

¹⁴ According to the Director, if she is not present at the Preschool when a disciplinary issue arises, the Assistant Director should "do something about it," although the record contains no examples of the Assistant Director's ever disciplining any employee for any reason over her 10-year tenure.

¹⁵ That employee apparently had a history of calling in or being late. The Assistant Director informed the Director that the employee's lack of reliability affected the entire team of teachers. The Director ultimately decided to terminate the employee, after getting feedback from the Assistant Director and the Bookkeeper. The record is unclear regarding the timing of this termination.

3) Effectively recommending grievance adjustment

According to the Policy Manual's Grievance Policy,¹⁶ other than the employees involved, the Director is the only one who plays any role in employee grievances except for the Preschool Board, if the problem cannot be resolved by the Director. Indeed, the Director admitted that the Assistant Director does not have the authority to resolve employee grievances. Additionally, the Assistant Director testified that the Director is the only one with authority to adjust grievances under the Policy Manual, and that has been the Preschool's practice as well.

The Assistant Director further testified that if employees come to her with a complaint, she tells them to discuss it with the Director. The Director testified that she regularly discusses employee issues with the Assistant Director, but was only able to recall one example when they discussed possible resolutions to employee grievances.¹⁷

The Director also testified that the Bookkeeper does not handle grievances on her own, nor does she make any notes on the resolution of grievances. According to the Director, she seeks the Bookkeeper's input and recommendation regarding the resolution of employee grievances. Moreover, the Bookkeeper reports teacher conflicts to the Director and suggests that she discuss those conflicts with the teachers or documents what is happening. However, the record fails to provide sufficient documentary evidence or concrete examples to support that the Director generally follows the Assistant Director's or Bookkeeper's recommendations concerning grievance adjustments.

b. Assistant Director assigning classrooms and work hours and determining overtime

The Employer claims the Assistant Director's job duties include scheduling, assigning teachers to classrooms, rearranging hours, and authorizing overtime or deciding not to allow overtime in the Director's absence. As detailed below, the record does not contain sufficient documentary evidence and fails to support these claims.

According to the Policy Manual, the Director is solely responsible for making daily decisions, including staff schedules.¹⁸ The Assistant Director testified she has no involvement whatsoever in creating the schedule if the Director is present. The Director admitted that she alone makes decisions regarding employee transfers into different classrooms. In fact, the

¹⁶ The Grievance Policy states (emphasis added), "It is the policy of Community Pre-School to treat all employees justly, with respect, consideration and dignity. Every effort will be made to provide fair and prompt solutions to employee work related problems and complaints. An Open Door policy has been adopted and encourages employees to deal with problems or concerns with the person(s) involved. If this action does not resolve the problem, it should be brought to the attention of **the director**. **The director** will have a meeting with the staff members involved. The objective will be to get some clarification about what the issue is and how to resolve the problem or conflict fairly. [A]ll staff members will talk calmly and respectfully and professionally at all times. There will be no accusations made of the staff members. "I" messages, not "You" messages will be used in this meeting. A collaborative solution will be decided upon. The staff members will meet again to reevaluate the problem if necessary. The final step to be taken by an employee is to write a letter to the Pre-School Board if this problem can not be resolved otherwise."

¹⁷ The Director testified that the Assistant Director was present at a meeting with two teachers and came up with a possible solution, whereas the Assistant Director did not recall being present at any meeting and recalled that the Director came up with the solution that one employee would take her supplies home. The timing of these events is not specified in the record.

¹⁸ The Policy Manual contains a scheduling section that states (emphasis added): "Every attempt will be made to meet your requirements regarding number of hours, days and class that you want. However, not all requests can be made and **the Director** will often need to make adjustments for consistency and ratios within a classroom."

record contains an example when the Director made the decision to transfer an employee into another classroom even though the Assistant Director communicated her opposition to the transfer.¹⁹

The Assistant Director testified about having two or three conversations with the current Director about teacher suitability in particular classrooms, and she gave the Director her opinion. The Assistant Director testified her opinion regarding whether or not the teacher should be moved or remain in the classroom was based on factors such as other people in the classroom or the age of the children. However, the record does not contain any specific examples, the timing regarding the Assistant Director's input, nor the impact it had on the Director's decision whether to transfer these particular teachers.

The record contains only one instance when the Assistant Director was involved in any scheduling in the Director's absence. That involved a joint effort with the teachers and occurred about a month after the Director was hired and when she took an extended vacation for 3 weeks. According to the Assistant Director, the schedule the Director devised did not provide adequate teacher coverage throughout the day. In the Director's absence, the Assistant Director and the teachers worked together to formulate a schedule with more even coverage throughout the day, to ensure that they had proper student to teacher ratios to comply with State of California licensing requirements.²⁰ The Assistant Director testified that she believed the Director changed the schedule back when she returned from vacation. Notably, there is nothing in the record to indicate that in over 10 years, the Assistant Director ever made any scheduling decisions on her own.

According to the Policy Manual, the Assistant Director is responsible for making classroom observations,²¹ but she testified that simply entails providing a resource for the teachers if they want suggestions on how their program is running, rather than observing the teachers for any performance evaluation. The Assistant Director further testified about having only one informal discussion with the Director regarding a classroom observation at a time unspecified in the record. The Assistant Director also testified that on another occasion at an unspecified time, she suggested having a staff meeting to address the Preschool's open-ended teaching method and participated in that staff meeting by explaining what open-ended teaching meant, to ensure that the teachers used the Preschool's method of instruction.

The Policy Manual specifically states that overtime requests must be approved in advance by the Director. The Assistant Director also testified that the Director is the only one with authority to authorize overtime.²² In over 10 years as the Assistant Director, she has never authorized overtime, nor has she been told that she has the authority to grant overtime.

¹⁹ The Assistant Director testified about a time that the Director made a decision to transfer an employee, who apparently was gossiping, into another classroom. The Director asked the Assistant Director's opinion regarding the move, and the Assistant Director told her she disagreed with the transfer, but the Director moved the teacher anyway. The record is unclear as to when this occurred.

²⁰ The Assistant Director testified that the Director is the only one who is responsible for maintaining compliance with State of California student to teacher ratio licensing requirements, but that the teachers are all aware of the need to maintain proper ratios. If the teachers are not in compliance, they would take actions to comply and/or would report the issue to the Director.

²¹ The Assistant Director testified that she believes the Curriculum Coordinator, a Unit position, also performs classroom observations to give feedback to teachers.

²² In the Employer's Post-Hearing Brief, it claims that the Assistant Director admitted she has the authority to authorize overtime if necessary. The record does not support this assertion. The testimony the Employer cites is the Assistant Director repeating that she has never authorized overtime, agreeing that the situation has never come up, and stating that in one circumstance, she and other teachers collaboratively changed schedules to comply with ratio requirements and to avoid overtime. In short,

c. Secondary Indicia

The Employer also relies on secondary indicia to support its position that the Assistant Director and Bookkeeper are supervisory employees.

1) Attendance at supervisory meetings

As stated above, the Director is responsible for operating the Preschool and providing financial reports to the Preschool Board at monthly Preschool Board meetings. The Director is required to attend monthly Preschool Board meetings. Since approximately May 2008, when the Preschool contracted with a financial consultant to prepare monthly financial reports for the Preschool Board, the Bookkeeper is no longer required to be present at monthly Preschool Board meetings.

2) Wages & Benefits

The Assistant Director and Bookkeeper all earn significantly more than nearly all the remaining employees in the bargaining unit, except for the person occupying the Unit Curriculum Coordinator position²³ who makes more than the Director at the Preschool due to her seniority. As stated above, the Director earns an annual salary of \$54,000. The Assistant Director works approximately 30 to 32 hours per week and earns an hourly wage of \$28.85 per hour. The Bookkeeper works about 27 to 30 hours per week and earns an hourly wage of \$28.35 per hour. The hourly wage range for teachers is approximately \$15 to \$24 per hour. Teachers' aides earn around \$14 per hour. The cook earns approximately \$14 or \$15 per hour.

3) Regarded as supervisors by other employees and admitted supervisors

According to the Director, she considers the Assistant Director and the Bookkeeper as supervisors. The Director posited the employees would know the Assistant Director is vested with supervisory authority because they are told at orientation and at staff meetings that they can come to the Assistant Director if they have an issue and that she is a liaison between the Director and the teachers.²⁴ However, there is no documentary or sufficient testimonial evidence to support the Employer's claim that employees have been notified the Assistant Director and/or the Bookkeeper have the authority to make supervisory decisions in the Director's absence. Moreover, both the Assistant Director and Bookkeeper testified they have never been told they have such authority.

4) Ratio of supervisory to nonsupervisory employees

If the Assistant Director and Bookkeeper are included in the Unit, then there would be one supervisor, the Director, for 35 total employees.

there is nothing in the record to indicate that the Assistant Director admits she has the authority to authorize overtime if necessary.

²³ The Bookkeeper testified she thinks the Curriculum Coordinator makes an hourly wage of approximately \$29 per hour.

²⁴ There is insufficient evidence in the record to indicate that the Preschool Board or the Council collectively considers the Assistant Director or the Bookkeeper to be supervisors. Darryl Alford, the Chairman, identified the Assistant Director and the Bookkeeper as management staff that report to the Director and testified that if the Director was not available and he had questions about Preschool operations, that he would call either the Assistant Director or the Bookkeeper.

5) Work location

As stated above, the Preschool office has 4 rooms, 3 of which are occupied by the Director, Assistant Director, and the Bookkeeper. The Director has her own private office with a door that can be shut. The Assistant Director and Bookkeeper, however, have limited privacy since they share an open office space outside the Director's office that is regularly accessed by staff, students, and parents.

6) Timekeeping

The Bookkeeper is solely responsible for keeping and reviewing employee timecards, noting any discrepancies, and bringing them to the Director's attention.

7) Substituting for the Director

The Policy Manual lists that one of the Assistant Director's and Bookkeeper's job responsibilities is to substitute for the Director when needed. The Assistant Director testified that she regularly substitutes for the Director from 7:30 to 8:30 a.m. Monday through Friday and every other Friday from 3:00 to 6:00 p.m.²⁵ In addition, the Assistant Director may substitute for the Director during her time away from the office, consisting of at least 2 weeks vacation per year²⁶ as well as during other absences.

According to the Assistant Director, when the Director is absent, she only performs her regular Assistant Director duties and has not performed any of the Director's duties. There is insufficient record evidence to show the Assistant Director was ever told what Director duties she was required to perform when substituting for the Director. In fact, in over 10 years as the Assistant Director, Ms. Medwin testified she has never exercised any of the Director's duties, even in the Director's absence. Likewise, she has never resolved any employee complaints from staff nor has she been the substitute director during a State licensing inspection. Further, when the Director is absent and a situation arises requiring the Director's authority, the Assistant Director waits for the Director to return and/or attempts to contact her by phone rather than taking any action by herself.

3. Bookkeeper's Alleged Confidential Status

The Employer also argues that the Bookkeeper position should be excluded from the Unit because of its confidential status. Specifically, the Employer alleges the Bookkeeper assists in preparing all financial reports and budgets; handles all payroll and benefits at the Preschool; regularly accesses employee personnel files and discusses employee grievances and disciplinary issues; and participates in and effectuates management policies and decisions.

²⁵ The Director testified the Assistant Director substitutes every other Friday from 2:00 p.m. to 6:00 p.m., but the Bookkeeper testified that the Director does not usually leave on those Fridays until around 3:00 p.m. The Director also testified that if she is absent and an employee needs to leave work, the employee would give any leave request to the Assistant Director, who would leave it on the Director's desk to approve when she returns to work. For example, about 2 weeks prior to the hearing, one of the teachers was very ill and needed to go home immediately. The Assistant Director tried to call the Director at home, but the Director was not able to answer her phone. The Director ended up getting back to work in time to let the sick teacher go home and replace her with another teacher to maintain the appropriate student to teacher ratio. The Director testified that the Assistant Director has the authority, in her absence, to make a similar decision to send a sick teacher home and replace her with another teacher. However, the record contains no examples of this ever occurring.

²⁶ The Director consults the Bookkeeper and Assistant Director before scheduling vacation.

a. Assists in preparing all financial reports and budgets

In approximately March 2008, the Preschool hired a financial consultant who was given access to the Preschool's computer system, including its financial records.²⁷ Until approximately May 2008, the Bookkeeper was responsible for preparing and presenting monthly financial reports to the Preschool Board. After May 2008, the financial consultant began presenting the monthly financial reports to the Preschool Board instead of the Bookkeeper. The Bookkeeper is still involved in the process of preparing the monthly financial reports by assisting the financial consultant, but no longer prepares the reports for the Preschool Board. The Bookkeeper receives a copy of the monthly financial reports along with the Director, Preschool Board, and the Council. The Bookkeeper has never provided a copy of the monthly financial reports to teachers and would refuse without first getting permission as she considers the information to be for management use only. The Preschool Board and the Council play a very active role in the Preschool's budgeting, including making decisions regarding whether any Preschool staff will receive salary/wage increases.

b. Handles all payroll and benefits at Preschool

The Bookkeeper is responsible for payroll and benefit administration at the Preschool but is not responsible for selecting any benefits. The Preschool Board decides the Preschool employees' benefits. However, at a time not specified in the record, the Bookkeeper and Director notified the Preschool Board about a workers' compensation carrier that was a better deal, and the Preschool Board approved changing to that carrier. The Bookkeeper does not negotiate any contracts with insurers and she does not select the health insurance for employees. Rather, she merely handles the insurance paperwork for employees.

The Director and Chairman of the Preschool Board have asked the Bookkeeper at unspecified times to compile wage increase projections as requested by the Council. These wage projections consist of a spreadsheet with a column for the staff's current wages along with columns containing suggested wage increase percentages. The record reveals the Council makes the ultimate determination regarding whether the Preschool staff will receive any salary increases. The Bookkeeper has not helped the Council, Board, or Director decide how any wage increases would be allocated.

In addition, at some time prior to the August 18, 2008, during a Council meeting, the Council asked for the Director and Bookkeeper to compile salary market research on what other preschools in the area were paying their staff. The Director contacted other preschools in the area to ask about wages, and the Bookkeeper searched the internet to find comparable preschool salaries in the area. The Director and the Bookkeeper attended the August 18, 2008, Council meeting,²⁸ in which she and the Director provided their salary market research. The Director then proposed a wage increase to the Preschool Board. The Council deferred their decision regarding any increases because the Council wanted more wage/salary comparison information. The Bookkeeper left the Council meeting immediately after the salary discussion. The Employer did not elaborate further in the record on the status of the deferred wage increase matter.

²⁷ The Bookkeeper's computer contains the majority of the Preschool's financial records, and it is password protected. The Bookkeeper testified that the Director, Assistant Director, and the consultant have the password to her computer to access the Preschool's financial records.

²⁸ Notably, the Director and Bookkeeper are listed as "guests" in the August 18th Church Council meeting minutes rather than as "attendees." The Bookkeeper testified that she does not regularly attend the Council meetings, but that she understands they are open to the staff and the Church congregation. The Bookkeeper also speculated that the staff or Church congregation probably would not be allowed to sit in on any Preschool salary discussions, but she has not observed such a restriction ever occurring.

c. Regularly accesses employee personnel files and discusses employee grievances and disciplinary issues

The Bookkeeper does have access to employee personnel files, including the Director's notes that she uses in evaluating employees, but the Bookkeeper testified she does not use or need those Director's notes in the course of her work.

As stated above, the Director discussed some employee grievances with the Bookkeeper, particularly when the Bookkeeper reported to the Director concerns employees have shared with the Bookkeeper. In those circumstances, the Bookkeeper suggests things such as the Director having a discussion with the teachers or making sure that the Director documents the discussion. It is undisputed that no notes are taken of such discussions between the Director and the Bookkeeper. Regardless, the Director admits that she always engages in independent investigations concerning any employee issues in addition to any discussions she may have with the Bookkeeper. It is also undisputed that the Bookkeeper does not keep any notes about the Director's investigations, decisions, or grievance resolutions, and the Bookkeeper has no authority to handle grievances on her own.

The Director has also utilized the Bookkeeper to edit two out of the four written warnings the Director has issued. The edits were mostly for style rather than substance and to get another pair of eyes to insure the warnings were properly worded. There is nothing in the record to indicate that the Bookkeeper has reviewed any other documents pertaining to these two write-ups.

d. Participates in and effectuates management policies and decisions

According to the evidence presented by the Employer, around July 2008, the Council passed a motion increasing the Preschool's facility fee contribution from approximately \$130,000 per year to \$178,000 per year. The Director discussed the new increased fee with the Bookkeeper, who recommended the Preschool not pay the increased amount and continue to pay the Church the previously established amount. According to the Director, based solely on the Bookkeeper's recommendation, she agreed to refuse to pay the increased amount. The Director and the Bookkeeper sent emails to the Chairperson of the Finance and Personnel Board ("Chairperson") regarding the rationale behind the Preschool's refusal to pay the increased amount. The Director did not ask the Bookkeeper to send her own email to the Chairperson and the Bookkeeper did not obtain the Director's permission before sending it.²⁹ Regardless of the Director and Bookkeeper's actions in this regard, the final decision regarding the Preschool's contribution amount appears to rest solely with the Church Council, which appears to have rejected the Director and/or Bookkeeper's opposition to the increased contribution fee.

The Bookkeeper, Assistant Director, and Director also review the Policy Manual annually and jointly provide input regarding any changes. About 15 years ago, the Bookkeeper recommended changing the Preschool's time off policy from vacation to PTO. She proposed the change to the then Director, who brought it to the Preschool Board, and the Preschool Board accepted the proposal. At an unspecified time, the Bookkeeper and the Director also proposed that the Preschool Board change the Preschool's workers' compensation carrier, because they were at a conference together and noticed a workers' compensation carrier that had a better deal. The Preschool Board approved the change of carriers. In each of these

²⁹ Indeed, documentary evidence suggests that the Bookkeeper sent her email in her role as a very long time member of the Church congregation rather than in her role as the Bookkeeper. In fact, the Bookkeeper testified that she drafted the email at home and was not paid by the Preschool for doing so.

instances, the record is clear that the Preschool Board had the ultimate authority to make the policy decisions regarding PTO and workers' compensation carriers. However, the record is unclear as to whether the Preschool Board conducted its own independent investigation before making these policy decisions.

II. ANALYSIS³⁰

A. Section 2(11) and the Relevant Supervisory Criteria

Section 2(3) of the Act excludes any individual employed as a supervisor from the definition of "employee." Section 2(11) of the Act defines "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006), the Board, citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001), stated its three-part test, which finds individuals to be statutory supervisors if:

- (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" or "responsibly to direct") listed in Section 2(11);
- (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"; and
- (3) their authority is held "in the interest of the employer."

The Board has also established that the burden to prove supervisory authority, by a preponderance of the evidence, is on the party asserting it. *Croft Metals, Inc.*, 348 NLRB 717, 721. (2006). See also *Loyalhanna Health Care Associates d/b/a Loyalhanna Care Center*, 352 NLRB No. 105 (2008). "Purely conclusory" evidence is not sufficient to establish supervisory status; and a party must present evidence that the employee "actually possesses" the Section 2(11) authority at issue. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). To qualify as a supervisor, it is not necessary that an individual possess all of the criteria specified in Section 2(11), instead, possession of any one of them is sufficient to confer supervisory status. *Lakeview Health Center*, 308 NLRB 75, 78 (1992). Finally, "whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

It is also well established that the party seeking to establish supervisory authority must show that the putative supervisor has the ability to require that certain action be taken; supervisory authority is not established where the putative supervisor merely has the ability to

³⁰ The Board permits the processing of a UC petition midterm where it is necessary to resolve a dispute that the parties have been unable to resolve. See *Kirkhill Rubber Co.*, 306 NLRB 559 (1992) (petition was processed during certification year where employees voted without challenge, but the parties disagreed as to their placement and could not resolve the dispute). Applying this precedent, since the parties did not resolve the placement or status of the contested positions of Assistant Director and Bookkeeper during the processing of 32-RC-5590 and have not thereafter been able to resolve their dispute, I find the instant petition to be timely.

request that a certain action be taken. *Golden Crest*, 348 NLRB at 729, citing *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 459 (2001). Further, assignment of work through a consensus of those that will be affected by the assignment does not meet the additional criteria of independent judgment. *Hospital General Menonita v. N.L.R.B.*, 393 F.3d 263, 267 (1st Cir. 2004); *Edward St. Daycare*, 189 F.3d 40, 48 (1st Cir. 1999).

In the instant case, the Employer asserts the Assistant Director meets the primary indicia for supervisory status because she disciplines employees, assigns classrooms and work hours, and grants overtime. The Employer also asserts the Assistant Director and Bookkeeper make effective recommendations regarding discipline, hiring and discharge, and grievance adjustments.

1. Discipline, assign, grant overtime

Here, the record is clear that the Director is the only one with authority and the only one who has ever exercised that authority to discipline, assign classrooms and work hours, and grant overtime.

With respect to discipline, Ms. Medwin has never disciplined any employees in over 10 years as the Assistant Director. At most, the Assistant Director has reported employee issues to the Director to handle. It is well established that the mere exercise of a reporting function which does not automatically lead to further discipline or adverse action against an employee does not establish disciplinary authority. *Lakeview Health Center*, 308 NLRB 75, 78-79 (1992), citing *Ohio Masonic Home*, 295 NLRB 390, 393 (1989); and *Passavant Health Center*, 284 NLRB 887, 891 (1987).

As for assignment, the record reveals that, when the Director was absent, the Assistant Director, in a collaborative fashion with other teachers, worked out classroom assignments and work hours to ensure that the Preschool stayed in compliance with state-mandated student to teacher ratios and to avoid overtime, since only the Director can authorize overtime. Indeed, the record contains no evidence of the Assistant Director ever assigning teachers to other classrooms, or any other place, and as such, there is no support for the Employer's contention in this regard. Ms. Medwin also testified that scheduling was not a responsibility of her position, and there is nothing in the record to indicate she has been involved in scheduling other than in one isolated instance noted above when by consensus among the teachers, they adjusted their schedules.

Further, it is undisputed that even when the Director was absent and the Assistant Director and the teachers collaborated to ensure they maintained State-mandated teacher to student ratios and avoided any overtime, the Director retained the final authority, changed the schedule upon her return, and possessed the sole ability to assign overtime. Ms. Medwin's description of her role in scheduling is consistent with the routine and clerical nature of the work described in *Bredero Shaw*,³¹ in which the Board found where the putative supervisor could "pretty much predict" what the schedule would be, and he "more or less formalized it on a calendar format," such actions failed to demonstrate the use of independent judgment necessary to constitute the Section 2(11) assignment of employees.

The Employer's brief argues that the factors endorsed by the Board in *Atlantic Limousine, Inc.*,³² are similar to those established by the Preschool at the Hearing. Specifically, the Employer argues that in the Director's absence, the Assistant Director can rearrange teacher's work schedules, send them home if there are not enough students on site, grant time off for illness or doctor's appointments, and grant overtime. First, as stated above, the record

³¹ 345 NLRB 782, 785 (2005).

³² 316 NLRB 822, 827, fn. 6 (1995).

evidence does not support that the Assistant Director possesses or has ever exercised any authority to rearrange teacher's schedules, send teachers home, grant time off, or to grant overtime. Second, unlike the instant case, in *Atlantic Limousine, Inc.*, the dispatchers there not only possessed the authority but actually adjusted driver timecards and tip allowances, made work assignments, granted time off, and sent drivers home, and thus were appropriately determined to be supervisors.³³

In sum, the record evidence does not support finding that the Assistant Director's role in discipline, assigning classrooms or work hours, or in determining overtime, is sufficient to demonstrate Section 2(11) status.

2. Effective Recommendations

The Employer asserts the Assistant Director and Bookkeeper make effective recommendations regarding discipline, hiring and discharge, and resolutions of employee grievances.

With respect to discipline, the Director testified she gets feedback from the Assistant Director and the Bookkeeper regarding employee disciplinary issues. However, she always conducts an independent investigation consisting of talking to the involved teachers about the issue, talking to the Assistant Director, and making an informed decision about the need for discipline, before she decides to issue any discipline.

As for hiring, the record does not establish that the Assistant Director or the Bookkeeper possess the authority to effectively recommend the hiring of employees. Rather, the record shows that the Director hires employees after conducting an independent investigation. In particular, the Director reviews the applicant's resume and interviews the applicant by herself. Only rarely has the Director had the Assistant Director and/or the Bookkeeper sit in on the second interview of the applicant, after which the Director solicited the opinions of the Assistant Director and/or the Bookkeeper. Plainly, the Assistant Director's and/or the Bookkeeper's opinions are rarely part of several considerations which the Director normally takes into account before deciding whether to employ an applicant. To the extent that the Assistant Director or the Bookkeeper's advice is ever considered, it merely reflects their decades of experience, rather than the possession of the type of authority contemplated by Section 2(11) of the Act. See *Oregon State Employees Ass'n*, 242 NLRB 976, 983 (1979).

For example, when the Bookkeeper expressed her opinion that the Preschool should not be involved in hiring employees requiring immigration sponsorship, the Director testified she heeded her advice, but failed to specify why. The record is silent regarding the reasons the Director heeded the Bookkeeper's advice, whether it was because the Bookkeeper had been in her position for over 20 years, because the Bookkeeper had particular knowledge or expertise in immigration matters, or for other reasons. As for the Assistant Director's hiring recommendations, the Director went ahead and hired at least one employee despite the Assistant Director's recommendation to the contrary.

In light of the foregoing and the record as a whole, the Employer has failed to meet its burden of establishing that the Assistant Director and/or Bookkeeper effectively recommend hiring.

Regarding discharge, the Director has sought the Assistant Director's and Bookkeeper's opinions regarding firing employees, but it is undisputed that the Director retains the sole decision making authority, has only fired 2 employees in her 2 ½ year tenure, and neither the Assistant Director nor the Bookkeeper played any role in those terminations. Similarly, with

³³ Id.

respect to employee grievances, the record is clear that the Director has the sole authority to adjust employee grievances, and has merely discussed some of the employee issues with the Bookkeeper and the Assistant Director during the adjustment process set forth in the Policy Manual.

In sum, the Employer failed to present sufficient testimony or documentary evidence that the Director's decision to discipline, hire, transfer, discharge, or to adjust grievances, was the result (in whole or even in part) of the Assistant Director's or the Bookkeeper's respective recommendations. The law is settled that although an individual is empowered to recommend that other employees be disciplined, hired, transferred, fired, or disciplined, this authority is insufficient to satisfy the statutory standard for supervisors unless their superiors are prepared to implement these recommendations without an independent investigation or evaluation. *Waverly-Cedar Falls Center v. NLRB*, 933 F.2d 626, 628 (8th Cir. 1991), *citing Passavant Health Center*, 284 NLRB 887, 891 (1987); *see also Beverly Manor Convalescent Center*, 275 NLRB 943, 945-946 (1985). Here, the record is clear that the Director conducted her own independent investigations with respect to her decisions concerning disciplining, hiring, transferring, discharging and/or adjusting grievances. Moreover, the Employer failed to present sufficient evidence to establish that the any alleged recommendations were effective. Indeed, it appears that the Director did not follow purported recommendations, particularly regarding teacher hires, transfers, and grievance adjustments. In view of the above and the record as a whole, the Employer has failed to meet its burden of establishing that the Assistant Director and Bookkeeper effectively recommend any of the actions listed as primary indicia in Section 2(11). *Valley Mart Supermarket*, 264 NLRB 156, 161 (1982); *Beverly Enterprises v. NLRB*, 661 F.2d 1095, 1099-1100 (6th Cir. 1981).

I recognize the rule is clearly established in Board precedent that *possession* of authority consistent with any of the indicia of Section 2(11), not the exercise of that authority, is the evidentiary touchstone. *See, e.g., Pepsi-Cola Co.*, 327 NLRB 1062 (1999). However, the absence of any exercise of the authority for a sustained and lengthy period—over 10 years for the Assistant Director and over 20 years for the Bookkeeper—raises a serious question whether the Assistant Director and Bookkeeper do in fact possess statutory supervisory authority. *See Allstate Ins. Co.*, 332 NLRB 759, 760 (2000). When this passage of decades is considered in light of the balance of the record, it further supports finding neither the Assistant Director nor the Bookkeeper possesses supervisory authority.

Based on the record evidence, I find that the Employer failed to meet its burden of demonstrating that the Assistant Director or the Bookkeeper possesses any of the primary indicia of supervisory authority as defined in Section 2(11) of the Act.

B. Secondary Indicia

The Employer also relies on secondary indicia to support its position that the Assistant Director and Bookkeeper are supervisory employees. In summary, the Assistant Director and Bookkeeper all earn significantly more than nearly all the remaining employees in the bargaining unit, except for the Curriculum Coordinator, who is included in the Unit. However, there is insufficient record evidence that any employees have been notified the Assistant Director and the Bookkeeper have the authority to make supervisory decisions in the Director's absence.

As for supervisory ratio, I note that if the Assistant Director and Bookkeeper are included in the Unit, there will only be one supervisor for 35 employees. The Employer cites *Formco, Inc.*, arguing that the Board has rejected disproportionate employee to supervisor ratios of 30 to one and perhaps 70 to one.³⁴ However, the facts in *Formco, Inc.* are distinguishable from the

³⁴ 245 NLRB 127, 128 (1979).

facts here. The foremen in *Formco, Inc.* had the authority to transfer employees from one job to another within their departments, exercised responsible judgment in administering their departments, had explicit written authority to adjust grievances, allowed employees to leave early, issued and signed disciplinary notices, and effectively recommended discipline.³⁵ Here, the record contains no evidentiary support that the Assistant Director or the Bookkeeper possess any of the supervisory indicia that the *Formco, Inc.* foremen possessed. Moreover, in *Formco, Inc.*, the Board cited the high employee to supervisor ratio as “further” support, not the “only” support, for its conclusion that the foremen were supervisors within the meaning of the Act.³⁶

The Employer also relies upon *Pennsylvania Truck Lines, Inc.*,³⁷ which is likewise distinguishable from the instant matter. The strip supervisors and dispatchers in *Pennsylvania Truck Lines, Inc.*, on several occasions, had exercised the authority to discharge drivers for serious misconduct, sent drivers to other terminals, required drivers to work overtime, and had therefore exercised independent judgment in assigning and directing drivers’ work.³⁸ Here, the Assistant Director and the Bookkeeper have never exercised such supervisory duties and the record contains insufficient evidence that they even possess such supervisory authority.

As for office space, unlike the Director, the Assistant Director and Bookkeeper share a common office with little privacy, as it is routinely frequented by staff, students, and parents. The record further reveals that the Bookkeeper is solely responsible for maintaining employee timecards and ensuring that any discrepancies are brought to the Director’s attention.

The Policy Manual also lists that one of the Assistant Director’s and Bookkeeper’s respective job responsibilities is being able to substitute for the Director when needed. I also note that the Assistant Director is regularly the highest ranking representative at the Preschool. The Employer argues that the Assistant Director is analogous to the towboat pilots in *American River Transportation Co.*, because, as with the towboat pilots, the Assistant Director is responsible, in the Director’s absence, to perform the Director’s duties, including ensuring effective daily operations, compliance with licensing requirements, handling employee grievances, assigning work hours and overtime, if needed, and the safety of the children at the facility.³⁹ In claiming that the Assistant Director is responsible for these Director duties, the Employer only cites to the Director’s testimony on direct examination rather than the Assistant Director’s testimony or any other record evidence to the contrary. In fact, the Assistant Director testified and the record evidence supports that it was the Director’s sole responsibility to comply with licensing requirements, adjust employee grievances, assign work hours, and grant overtime. Thus, there is, at the very least, conflicting evidence surrounding the Assistant Director and Bookkeeper’s purported supervisory authority. In such instances, the Board has not found supervisory authority present. See *Phelps Community Medical Center*, supra.

Moreover, the Board has held that secondary indicia alone will not support a finding of supervisory and/or managerial status in the absence of evidence establishing the possession of primary indicia. See *Property Markets Group, Inc.*, 339 NLRB No. 32, slip op. at 11 (2003). See also *Case Corp.*, 304 NLRB 939 (1991). Here, the Employer has failed to meet its burden

³⁵ *Id.* at 128-129.

³⁶ *Id.* at 128.

³⁷ 199 NLRB 641, 642 (1972).

³⁸ *Id.*

³⁹ 347 NLRB 925, 927 (2006). Unlike the Assistant Director and the Bookkeeper in the instant case, the towboat pilots possessed the authority to responsibly direct the towboat crew in their work, to assign work, and used independent judgment to determine that the assignment of certain tasks to the crew is necessary for the safe passage of the boat and tow. Here, there is insufficient record evidence that the Assistant Director or the Bookkeeper possesses or exercises any such supervisory authority.

of establishing that the Assistant Director and/or Bookkeeper possess primary indicia of supervisory authority.

C. Confidential Status

The Employer also argues that the Bookkeeper position should be excluded from the Unit because of her confidential status. The Board has held that confidential employees are persons “who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.” *E.C. Waste, Inc.*, 339 NLRB 262, n. 1 (2003), *enfd.*, 359 F. 3d 36, 174 LRRM 2417 (2004) (quoting *NLRB V. Hendricks County Rural Electric Membership Corp.*, 454 US 170, 189(1981)); *B.F. Goodrich*, 115 NLRB 722 (1956). See also *Ladish Co.*, 178 NLRB 90 (1969); *Chrysler Corp.*, 173 NLRB 1046 (1969). In *Holly Sugar Corporation*, 193 NLRB 1024, 1025-6 (1971), the Board noted that it would not find confidential status for employees who merely act as secretaries for individuals involved in the processing of grievances, as they did not formulate, determine, and effectuate the labor relations policies of management. The burden of proof is on the party (the Employer here) who asserts the Bookkeeper should be excluded from the unit on the basis that she is a confidential employee. *Intermountain Rural Electric Assn.*, 277 NLRB 1, 4 (1985).

Nonlabor related matters, even though confidential, are “irrelevant” to the determination of whether an employee is a confidential employee. *NLRB V. Hendricks County Rural Electric Membership Corp.*, 454 US 170, 191-192 (1981). It is therefore insufficient that an employee may on occasion have access to certain labor related or personnel type information. *Intermountain Rural Electric Assn.*, 277 NLRB 1, 4 (1985). What is contemplated instead is that a confidential employee is involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding this policy before it is made known to those affected by it. *Id.*

In light of this Board precedent, just because the Bookkeeper assists in preparing financial reports and budgets; handles all payroll and benefits; has attended some Preschool Board meetings in the past in which proposed wage increases were addressed; has prepared wage increase percentages for the Preschool Board’s use; has assisted the Director in gathering wage and benefit comparisons; files time cards in employee personnel files; has edited merely for style at least two out of four written reprimands for the Director; has provided input regarding employee grievances; recommended a change in Preschool time off policy 15 years ago from vacation to PTO; recently recommended, along with the Director, a change to workers’ compensation carriers; and has reviewed the Policy Manual annually, along with the Director and Assistant Director; is “irrelevant.” See *Waste Management De Puerto Rico*, 339 NLRB 262, 282 (2003). This is so because the record contains insufficient evidence that such matters have any material connection with negotiations for a collective bargaining agreement. *Id.*

The mere fact that the Bookkeeper has access to financial and personnel data does not render her a confidential employee. See *Walgreen Co.*, 114 NLRB 1168, 1170 (1955). The Board has consistently held that an employee will not be regarded as confidential merely by virtue of having access to confidential records relating to the budget and other financial data. See *Planned Parenthood Association*, 217 NLRB 1098, 1098 (1975). Similarly, the fact that the Bookkeeper may be entrusted with business information to be withheld from other teachers or that her work may affect teachers’ pay scales does not render her confidential or managerial. See *Swift & Co.*, 129 NLRB 1391, 1393 (1961). Indeed, there is nothing in the record to support that the Bookkeeper’s responsibilities have anything to do with the Preschool’s labor policies or that the Bookkeeper or even the Director to whom she reports otherwise participates in the

formulation or effectuation of the Preschool's general labor policies. See *Hampton Roads Maritime Assn.*, 178 NLRB 263 (1969).

Furthermore, it is apparent from the record that the Preschool Board and/or Council are currently vested with the authority to formulate, determine, and effectuate management policies in the field of labor relations and that such authority does not rest with the Director. Additionally, it is undisputed that the parties have not started bargaining and that the Council has not even determined who will participate in its bargaining team. Those who may at some time in the future function as confidential employees but who are not doing so at the time the determination is made do not belong in the normally excluded confidential category. *American Radiator Corp.*, 119 NLRB 1715, 1720-1721 (1958).

In light of the above and the record as a whole, I find that the Employer failed to meet its burden of demonstrating that the Bookkeeper is a confidential employee and shall therefore include the Bookkeeper position in the Unit.

III. CONCLUSION

I find that unit clarification is appropriate to resolve the unit placement of the Assistant Director and Bookkeeper positions. I further conclude that there is insufficient record evidence to establish that the Assistant Director and the Bookkeeper positions are supervisory or that the Bookkeeper position is confidential. I find that the Assistant Director and Bookkeeper classifications should be included in the facility-wide unit of all Preschool employees. I shall therefore issue an order clarifying the Unit to include the Assistant Director, Bookkeeper, and Handyman positions.

IV. ORDER

IT IS HEREBY ORDERED that the Unit is clarified to include the Assistant Director, Office Administrator/Bookkeeper, and Maintenance Engineer (Handyman) positions.⁴⁰

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570 by

⁴⁰ Pursuant to this Order, the Unit shall consist of all full-time and regular part-time Teachers, Assistant Teachers, Teacher's Aides, Curriculum and Staff Coordinator, Cook, Assistant Cook, Maintenance Engineer (Handyman), Assistant Director, and Office Administrator/Bookkeeper, employed by the Employer at its Sunnyvale, California pre-school facility; excluding managers, guards and supervisors as defined in the Act.

5 p.m. EDT on February 11, 2009. The request may be filed electronically through E-Gov on the Board's web site, www.nlrb.gov,⁴¹ but may not be filed by facsimile.

Dated at Seattle, Washington, this 28th day of January, 2009.

/s/Richard L. Ahearn
Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

⁴¹ To file a request for review electronically, go to www.nlrb.gov and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, www.nlrb.gov.